

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO
3
4 In Re:) Docket No. 3:17-BK-3283 (LTS)
5)
6) PROMESA Title III
7 The Financial Oversight and)
8 Management Board for)
9 Puerto Rico,) (Jointly Administered)
10)
11 *as representative of*)
12)
13 The Commonwealth of)
14 Puerto Rico, *et al.*) October 6, 2021
15)
16 Debtors,)
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18)
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12 In Re:) Docket No. 3:17-BK-4780 (LTS)
13)
14) PROMESA Title III
15 The Financial Oversight and)
16 Management Board for)
17 Puerto Rico,) (Jointly Administered)
18)
19 *as representative of*)
20)
21 Puerto Rico Electric Power)
22 Authority,)
23)
24 Debtor,)
25)

20 OMNIBUS HEARING
21 BEFORE THE HONORABLE U.S. DISTRICT JUDGE LAURA TAYLOR SWAIN
22 UNITED STATES DISTRICT COURT JUDGE
23 AND THE HONORABLE U.S. MAGISTRATE JUDGE JUDITH GAIL DEIN
24 UNITED STATES DISTRICT COURT JUDGE
25)

1 APPEARANCES:

2 ALL PARTIES APPEARING VIA VIDEOCONFERENCE OR TELEPHONICALLY

3 For The Commonwealth

4 of Puerto Rico, et al.: Mr. Martin J. Bienenstock, PHV
Mr. Brian S. Rosen, PHV
5 Mr. Daniel S. Desatnik, PHV

6 For Puerto Rico Fiscal
Agency and Financial

7 Advisory Authority: Mr. Luis C. Marini Biaggi, Esq.
Mr. Madhu Pocha, PHV

8 For Peter Hein:

Mr. Peter Hein, Pro Se

9 For AmeriNational

10 Community Services: Mr. Nayuan Zouairabani Trinidad, Esq.

11 For Cantor-Katz

12 Collateral Monitor: Ms. Taleah Jennings, PHV
Mr. Peter J. Amend, PHV

13 For Windmar Renewable
Energy, Inc.:

Mr. Fernando Agrait, Esq.

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23 Proceedings recorded by stenography. Transcript produced by
24 CAT.
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1	I N D E X	
2	WITNESSES:	PAGE
3	None.	
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5	EXHIBITS:	
6	None.	
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1 San Juan, Puerto Rico

2 October 6, 2021

3 At or about 9:27 AM

4 * * *

5 THE COURT: Buenos dias. Counsel and parties in
6 interest, please turn your cameras on for these introductory
7 remarks and instructions, and keep your microphones muted.

8 Ms. Tacoronte, would you please call the case?

9 COURTROOM DEPUTY: *In re: The Financial Oversight and*
10 *Management Board for Puerto Rico, as representative of the*
11 *Commonwealth of Puerto Rico, et al.*, PROMESA Title III, case
12 no. 2017-BK-3283, for Omnibus Hearing.

13 THE COURT: Thank you.

14 Welcome, counsel, parties in interest, and members of
15 the public and press.

16 Oh, Ms. Tacoronte, did you also want to announce
17 who's presiding?

18 COURTROOM DEPUTY: Absolutely, Your Honor.

19 The United States District Court for the District of
20 Puerto Rico is now in session. The Honorable Laura Taylor
21 Swain presiding. Also present, Magistrate Judge Judith Dein.
22 God save the United States of America and this Honorable
23 Court.

24 THE COURT: Thank you.

25 Despite the great difficulties of this past year and

1 a half, with a cautious eye on the coming months, the Court is
2 encouraged by the recovery efforts and the continued attention
3 to public health measures, both in Puerto Rico and on the
4 mainland. As evidence of that progress, it is a privilege to
5 join you virtually as I preside from the Clemente Ruiz Nazario
6 United States Courthouse in San Juan, Puerto Rico.

7 To ensure the orderly operation of today's virtual
8 hearing, once we turn to our Agenda items, all parties
9 appearing by Zoom must mute their microphones when they are
10 not speaking and turn off their video cameras if they are not
11 directly involved in the presentation or argument. When you
12 need to speak, you must turn your camera on and unmute your
13 microphone on the Zoom screen.

14 I remind everyone that consistent with court and
15 judicial conference policies, and the orders that have been
16 issued, no recording or retransmission of the hearing is
17 permitted by anyone, including but not limited to the parties,
18 members of the press, and members of the public. Violations
19 of this rule may be punished with sanctions.

20 I will be calling on each speaker during the
21 proceedings. When I do, please turn your camera on, unmute
22 yourself, and identify yourself by name for clarity of the
23 record. After the speakers listed on the Agenda for each of
24 today's matters have spoken, I may permit other parties in
25 interest to address briefly any issues raised during the

1 presentations that require further remarks.

2 If you wish to be heard under these circumstances,
3 please use the "raise hand" feature at the appropriate time.
4 That feature can be accessed by selecting the reactions icon
5 in the toolbar located at the bottom of your Zoom screen. I
6 will then call on the speakers one by one. After you have
7 finished speaking, you should select the "lower hand" feature.

8 Please don't interrupt each other or me during this
9 hearing. If we interrupt each other, it's difficult to create
10 an accurate transcript, but as usual, and having said that, I
11 apologize in advance for breaking this rule, because I may
12 interrupt if I have questions or if you go beyond your
13 allotted time. If anyone has any trouble hearing me or
14 another participant, please use the "raise hand" feature
15 immediately to let us know there's a problem.

16 The Agenda, which was filed at docket entry no. 18387
17 in case no. 17-3283, is available to the public at no cost on
18 Prime Clerk for those who are interested. I encourage each
19 speaker to keep track of his or her own time. The Court will
20 also be keeping track of the time, and will alert each speaker
21 when there are two minutes remaining with one beep and, when
22 time is up, with two beeps. Here is an example of the beep
23 sound, which is different from the sound that we've been using
24 for our telephonic hearings.

25 (Sound played.)

1 THE COURT: If your allocation is two minutes or
2 less, you'll just hear the final beeps.

3 If we need to take a break, I'll direct everyone
4 to -- well, I was going to say to disconnect and dial back in,
5 but that's what we do for Court Solutions. So it may suffice
6 to just turn off the cameras and mute yourselves, and I'll
7 specify the time we should all come back. This is a short
8 hearing, so I probably won't have to do that today.

9 So please turn your cameras off now, and turn your
10 camera back on when we reach your Agenda item or if I call on
11 you. It is truly good seeing you all, so thank you.

12 The first Agenda item is, as usual, status reports
13 from the Oversight Board and AAFAF. As I requested in the
14 Procedures Order, these reports have been made in writing in
15 advance of this video hearing and are available on the public
16 docket at docket entry nos. 18401 and 18399 in case no.
17 17-3283, respectively.

18 I thank the Oversight Board and AAFAF for the care
19 and detail reflected in the reports, which, as always, cover
20 very important matters. I do not have further questions for
21 the parties in connection with these reports. I will now give
22 the representatives of the Oversight Board and AAFAF an
23 opportunity to make any further remarks.

24 First, the representatives of the Oversight Board.
25 Mr. Bienenstock, good morning.

1 MR. BIENENSTOCK: Good morning, Your Honor. Martin
2 Bienenstock of Proskauer Rose, LLP, for the Oversight Board.
3 Thank you for the opportunity, but we have nothing to add to
4 the report we filed last evening.

5 THE COURT: Thank you, Mr. Bienenstock.

6 Mr. Marini, representing AAFAF.

7 MR. MARINI BIAGGI: Good morning, Your Honor. Luis
8 Marini for AAFAF. Your Honor, we don't have anything to add
9 as well to the report that we filed.

10 THE COURT: Thank you.

11 If any counsel who are participating by Zoom have a
12 question or a comment they wish to make, please use the "raise
13 hand" function to indicate your request now, and then wait for
14 me to call on you to speak.

15 Are we seeing any raised hands?

16 COURTROOM DEPUTY: No.

17 LAW CLERK: (Shaking head from side to side.)

18 THE COURT: All right. It looks like no one has any
19 comment. So thank you again for the status reports.

20 We'll turn to Item II on the Agenda, which is the Fee
21 Application submitted by the Fee Examiner and counsel to the
22 Fee Examiner, which is docket entry no. 18117 in case no.
23 17-3283. Since the deadline to object to the Fee Application
24 has passed without objection, the application is unopposed and
25 no presentation is necessary.

1 The Court has reviewed the application and will enter
2 an order granting it.

3 The Court now turns to the third Agenda item, which
4 is Contested Matters. The first contested matter is Windmar's
5 Objection to PREPA's Notices of Assumption of Power Purchase
6 Operating Agreement, and that is docket entry nos. 2577 and
7 2578 in case no. 17-4780. My argument agenda begins with
8 Mr. Desatnik for the Oversight Board for seven minutes.

9 Good morning, Mr. Desatnik.

10 MR. DESATNIK: Good morning, Your Honor. Daniel
11 Desatnik of Proskauer Rose, LLP, on behalf of the Oversight
12 Board in its capacity as Title III representative of PREPA.

13 Your Honor, we're here today because PREPA seeks
14 approval of its assumption of two Power Purchase Operating
15 Agreements, or what I will refer to as PPOAs. The first PPOA
16 with Ciro One Salinas was entered into in October 2010 to
17 provide PREPA with 90 megawatts of renewable energy from a
18 photovoltaic solar project. The second PPOA with Xzerta Tec
19 was entered into in September 2012 to provide PREPA with 60
20 megawatts of renewable solar energy.

21 THE COURT: Mr. Desatnik, would you speak just a
22 little bit more slowly? That will be helpful to the court
23 reporter. Thank you.

24 MR. DESATNIK: Of course, Your Honor.

25 As I'll describe momentarily, both contracts have

1 subsequently been renegotiated and amended on approved terms
2 for PREPA. The Court should approve PREPA's assumption of
3 these amended PPOAs for three reasons: First, the amended
4 contracts confer numerous benefits on PREPA, demonstrating
5 that assumption is a sound exercise of PREPA's judgment.

6 Second, no party contests the benefit of these PPOAs.
7 The sole objection by Windmar alleges that despite being
8 approved by PREB, the PPOAs do not comply with Puerto Rico
9 law. Windmar is mistaken.

10 Third, the Court does not need to resolve this
11 question of Puerto Rico law on the merits, because Windmar has
12 not demonstrated any harm to it as a creditor of PREPA, and,
13 therefore, lacks standing to raise its argument.

14 Beginning with the first point, the scope of this
15 Court's review on a motion under section 365 is whether PREPA
16 exercised sound judgment in assuming the PPOAs. The
17 uncontested facts here show that PREPA's assumption clearly
18 meets the standard.

19 As relevant here, PREPA determined in 2019 to
20 renegotiate these PPOAs to bring them in line with market
21 prices and PREPA's fiscal plan targets. These negotiations
22 were successful. Both PPOAs were amended to include the sale
23 of renewable energy and renewable energy certificates at a
24 starting cost of 9.9 cents per kilowatt hour. This is down
25 from 15 cents per kilowatt hour in the original contracts.

1 Both amended contracts only permit a modest annual escalation
2 of price of one to two percent annually; they cap the maximum
3 cost per kilowatt hour; and they would enter commercial
4 operation within two years.

5 Finally, there are no cure costs that are due or
6 payable. According to PREB, these amendments result to
7 savings of 411 million over the life of the Ciro PPOA, and 170
8 million over the life of the Xzerta PPOA. These substantial
9 savings enable PREPA to meet the savings targets in its
10 certified fiscal plan, and they also enable PREPA to meet its
11 renewable energy portfolio target earlier than it otherwise
12 could.

13 On the basis of these amended contracts, they were
14 approved by PREPA's governing board, they were approved by the
15 Oversight Board, and they were further approved by PREB as
16 compliant with Puerto Rico energy policy. Your Honor, those
17 are the relevant facts here, and they amply demonstrate that
18 PREPA exercised sound judgment in assuming these contracts.

19 As I mentioned, there's only one objection to PREPA's
20 assumption. That objection by Windmar raises one discrete
21 legal issue: Whether the contracts failed to comply with
22 Puerto Rico law by bundling the sale of energy with the sale
23 of renewable energy certificates, or what I will refer to as
24 RECs.

25 Windmar does not argue that PREPA did not exercise

1 business judgment. They do not argue that the contracts do
2 not benefit PREPA or that PREPA fails any standard for
3 assumption. Windmar bases its contention on one sentence from
4 section 4.18 of Law 17-2019. That sentence defines an REC as,
5 quote, a tradable asset that may be transferred for any lawful
6 purpose, which is integrally and inseparably equal to one
7 megawatt hour of electricity generated from a sustainable
8 renewable energy source.

9 On the basis of this sentence, Windmar erroneously
10 concludes that RECs must be independently exchanged of the
11 actual selling of electricity, but the definition that I just
12 read of RECs does not place any restrictions on how they are
13 sold. It's actually the opposite. Once commoditized as one
14 megawatt hour of renewable energy, RECs can be traded for any
15 lawful purpose. Windmar doesn't articulate any policy reason
16 for why RECs must be separately bundled, or point to any case
17 or regulatory decision to support its misreading of the
18 statute.

19 While we submit that the Court can readily overrule
20 the objection on the face of Law 17, it need not reach the
21 merits of this dispute. As a threshold matter, Windmar lacks
22 standing to raise this argument. While Bankruptcy Code
23 Section 1109 enables a creditor to raise and be heard on any
24 issue, it must still demonstrate Article 3 standing. Windmar
25 has failed to demonstrate any personalized harm to it from the

1 PPOAs.

2 (Sound played.)

3 MR. DESATNIK: Its argument --

4 THE COURT: You have two minutes. Go ahead.

5 MR. DESATNIK: Its argument is squarely the type of
6 generalized grievance comparable to the common concern for
7 obedience to law that this Court recently held in the *UTIER*
8 adversary proceeding is insufficient to grant standing.

9 Finally, Your Honor, even if Windmar did have
10 standing, its concern about compliance with Puerto Rico law is
11 insufficient to override PREPA's business judgment. The First
12 Circuit recently rejected Windmar's attempt to defeat PREPA's
13 assumption of other PPOAs by arguing that those PPOAs did not
14 comply with Puerto Rico laws on competitive bidding.

15 It noted, and I quote, the fact that a course of
16 action poses some non-zero risk cannot by itself mean that a
17 decision to take an action must fail scrutiny under the
18 business judgment rule. It went on to note that, Windmar
19 offers no reason to think that the risk they have identified
20 was so great that it rendered the Board's decision necessarily
21 unreasonable. They have not identified a single case
22 invalidating a public utility contract on the laws they rely
23 on. And, Your Honor, the pincite for that is 9 F.4th 16 (1st
24 Cir. 2021).

25 Your Honor, the First Circuit's reasoning there is

1 equally applicable here, and so, for those reasons, we
2 respectfully request that the Court overrule Windmar's
3 objection and approve PREPA's assumption of the PPOAs. Unless
4 the Court has any questions, I rest.

5 THE COURT: Thank you, Mr. Desatnik.

6 Next I have Mr. Agrait for Windmar, and we have
7 allocated ten minutes.

8 MR. AGRAIT: Good morning, Your Honor.

9 THE COURT: Good morning. Would you please open your
10 camera, so that I can see you?

11 MR. AGRAIT: Yes. Now?

12 THE COURT: Yes. Now I see you. Good morning.

13 MR. AGRAIT: Attorney for the other party, Fernando
14 Agrait, for Windmar Renewable.

15 First, Windmar Renewable is a creditor of PREPA.
16 It's in economic competition with Ciro and Xzerta, and has
17 active PPOA contracts which separate the price of RECs and
18 energy. If the PPOA's, as amended, assumed, it could affect
19 its rights as a creditor and change the rules of competition
20 with Xzerta and Ciro Salinas One.

21 THE COURT: So how would you --

22 MR. AGRAIT: What --

23 THE COURT: May I ask you, sir, how would it change
24 Windmar's rights as a creditor?

25 MR. AGRAIT: Well, the key here, Your Honor, from our

1 perspective, is that the separate price for the RECs is not
2 only an issue of separate price versus bundle price. PREPA is
3 under the obligation to open up, together with the Bureau, the
4 Energy Bureau, an open RECs market, which doesn't exist in
5 Puerto Rico. And it doesn't exist because PREPA has not been
6 acquiring RECs other than paying some PPOAs' separate price
7 for RECs. And it's not opened up the information, making
8 available the information of the prices of RECs as a value
9 separate from the price of the energy it is acquiring in the
10 contracts.

11 As long as PREPA, who happens to be, for all
12 purposes, a public monopoly, in any way limits and reduces
13 access to the information concerning the price of RECs, it is
14 physically impossible for Puerto Ricans, producers of energy
15 and producers of the RECs, to participate in an open market,
16 which is ordered by the same law under which PREPA operates
17 its regular powers. So the absence of that information makes
18 impossible the existence of a market that the Legislature of
19 Puerto Rico has established as a part of the energy regulation
20 scheme in Puerto Rico.

21 THE COURT: So what gives you the right to litigate,
22 in this proceeding where PREPA simply wants to assume and
23 continue an agreement that it has negotiated with one of your
24 competitors, what gives you the right to litigate this
25 question of whether that particular contract is compliant with

1 Puerto Rico law?

2 I don't see a private enforcement provision in the
3 law that you've invoked; and PREPA argues that you don't have
4 standing to do that, you're not a party to the contract, and
5 there's not a direct harm to you from the contract.

6 MR. AGRAIT: Well, Your Honor, as a participant in
7 the PPOA market, as a participant in the REC market to be
8 established as the law requires, I have standing to question
9 whether the way that PREPA is handling this matter makes
10 possible or impossible -- or makes impossible, sorry, the
11 development of such market. The development of the RECs
12 market, it was not a decision of my client. His right to
13 participate in that market is a right that it has because of
14 the law, of the Puerto Rico law.

15 So all we're saying is as long as PREPA decides that
16 it will not provide information concerning the price of the
17 RECs, it's impossible to have a private RECs market in Puerto
18 Rico, because they are a monopoly. And if I don't have a
19 right to defend me being part of that market that the
20 Legislature ordered, then who would have standing for that?
21 That would mean that PREPA would just simply say, well, I'm
22 not going to comply with that; I don't want the market to
23 happen; and I won't give information that is pertinent and
24 necessary for the market to exist.

25 We don't want to enter into whether PREPA pays ten or

1 five or 13, and nine of that is energy, and three of that is
2 RECs, or one of that is RECs. That is plainly a decision, a
3 business decision of PREPA that could easily be confirmed, the
4 assumption, by the Court. But the problem is that it has a
5 consequence -- a consequence that goes beyond the decision of
6 bundling or unbundling.

7 In that sense, Your Honor, we are being marked out of
8 the market by the monopoly power decision not to share
9 information concerning the price of the RECs.

10 THE COURT: Would you agree that the statute, section
11 365 of the Bankruptcy Code, gives the Court, this Court the
12 authority to decide whether PREPA has exercised proper
13 business judgment, or reasonable business judgment, in
14 deciding to continue on with this contract -- but I don't see
15 that the Bankruptcy Code gives me authority to make broader
16 determinations as to PREPA's impact in the PPOA market in the
17 context of this assumption question.

18 What gives me the authority to start ruling on what
19 Puerto Rico law requires by way of disclosure to competitors
20 and PREPA's actions within the PPOA market?

21 MR. AGRAIT: Well, Your Honor, if the issue were
22 limited to does PREPA exercise business judgment in
23 determining that a particular price is going to be paid, and
24 it's a lower price than what they had negotiated before, then
25 I wouldn't be here to argue for my client. But the question

1 of whether a business judgment by PREPA needs to incorporate
2 whether PREPA is compliant or not with its legal obligations,
3 I think it's pertinent, because PREPA is in Bankruptcy Court,
4 but PREPA does not cease to be a government entity regulated
5 by its own law and with its own public obligations.

6 And what we're arguing here is that by going through
7 the process of assuming the contracts with the bundled price,
8 it's affirmatively avoiding public responsibilities. And I
9 think that it's reasonable to say --

10 (Sound played.)

11 MR. AGRAIT: -- that a board of directors needs to
12 comply with its legal obligations as part of its business
13 judgment.

14 THE COURT: Thank you. You can continue your
15 argument.

16 MR. AGRAIT: The Court would ask why did -- Windmar
17 did not go through the PREB to raise this issue. Well, we
18 didn't go because the PREB decided that it was a
19 nonadjudicable proceeding, and, as such, it did not permit
20 participation by third parties. And, also, PREB decided, upon
21 being asked by PREPA and Ciro and Xzerta, that the documents
22 of this contract were going to be confidential. So Windmar
23 did not have access to the PREB process.

24 And then -- I mean, at the same time, somebody cannot
25 say you don't have a right to participate in the PREB process,

1 and at the same time you don't have a right to participate in
2 the bankruptcy proceeding, because then who protects --

3 COURT REPORTER: I'm sorry, Counsel. Can you -- I'm
4 sorry, Your Honor. This is the court reporter. If counsel
5 could repeat his last sentence, please.

6 MR. AGRAIT: That Windmar was unable to go to the
7 PREB for the way the PREB handled this case, this matter. And
8 if we are told now that we don't have a private cause of
9 action or that we don't have the standing to raise this issue
10 in the bankruptcy court, we will be -- will find ourselves
11 without access to the Puerto Rico legislative regulatory
12 scheme, which is PREB, and at the same time be outside the
13 realm of the bankruptcy court. So there's nobody to even hear
14 the claim of Windmar.

15 (Sound played.)

16 THE COURT: So that was the time's up signal, but I
17 did take a lot of your time in asking my questions, so I will
18 give you two more minutes, if you wish.

19 MR. AGRAIT: I mentioned, Your Honor, that PREPA is a
20 public entity, one hundred percent of its powers come up from
21 public laws, and that nowhere, that I know, in the bankruptcy
22 applicable law it says that PREPA can move forward without
23 complying with its legislative obligations. PREPA has to
24 comply with its legislative obligations, and receive the
25 benefits of the bankruptcy proceedings of course. But here we

1 find ourselves that by merely saying "we are not going to say
2 what the price is," they are building a wall for the
3 development of the RECs market in Puerto Rico where my client
4 is a player.

5 So I say, why not? Why doesn't PREPA do what it does
6 in all other PPOAs, which is say -- saying, I pay so much for
7 the energy, and I pay so much for the environmental and social
8 attributes. That's the reality of the market in Puerto Rico.
9 But now PREPA is moving in the opposite direction, saying,
10 we're not going to bring that information to the market, so
11 the market cannot exist.

12 That's our position, Your Honor, with all due
13 respect.

14 THE COURT: Thank you, Mr. Agrait. Do you have
15 further remarks or is that it?

16 MR. AGRAIT: That's all on my part, Your Honor.

17 THE COURT: Thank you so much.

18 So I will return now to Mr. Desatnik for three
19 minutes.

20 MR. DESATNIK: Yes, Your Honor. I don't think I'll
21 need all three minutes. I'd just like to briefly respond to a
22 few of the points made by counsel. Primarily, they
23 effectively concede that they have no standing here. While in
24 their first sentence they say they're a creditor, they do not
25 allege any harm as a creditor of PREPA. In fact, Mr. Agrait

1 goes on to say that their true grievance is as a competitor of
2 Xzerta and Ciro, and that what they're really complaining
3 about is the economic competition and the effect that the
4 contracts have, in their view, on the REC market.

5 We cite to various opinions in our Reply, at
6 paragraphs 24 and 26, that demonstrate that competitors do not
7 have standing to object to contract assumption, and we feel
8 that those are definitive of the inquiry here.

9 Windmar is also conceding that their grievance is not
10 a bankruptcy or business judgment issue, but -- with PREPA's
11 governmental responsibilities outside of the bankruptcy, and
12 that's precisely our point.

13 (Sound played.)

14 MR. DESATNIK: These are not bankruptcy arguments
15 that they're making. They're not relevant to the assumption
16 inquiry under Bankruptcy Code section 365. They're making
17 numerous arguments about PREPA being a monopoly, but they've
18 done that before in the -- PREPA's assumption of the
19 EcoElectrica contract. And as I mentioned in my opening
20 remarks, that -- the First Circuit recently rejected those
21 arguments.

22 Counsel did not provide any reason to distinguish
23 those arguments today. And what we really think is at bottom,
24 animating Windmar's objection is that they're trying to
25 overturn PREB's approval of these contracts. And we believe

1 that an assumption motion is not the posture and this Court is
2 not the forum to collaterally attack PREB's approval.

3 Unless you have any questions, Your Honor, that
4 concludes my remarks.

5 THE COURT: Thank you, Mr. Desatnik. I don't have
6 further questions. I would just ask you both to be patient
7 with me for a couple of minutes as I gather my thoughts,
8 because I will rule on the motion in just a moment.

9 Thank you for your patience.

10 Pending before the Court is the *Notice of Assumption*
11 *of Power Purchase Operating Agreement by and between PREPA and*
12 *Ciro One Salinas, LLC dated October 25, 2010, which I'll refer*
13 *to as the "Ciro Notice", and a Notice of Assumption of Power*
14 *Purchase Operating Agreement by and between PREPA and Xzerta*
15 *Tec Solar I, LLC dated September 19, 2012, which I'll refer to*
16 *as the "Xzerta Notice", and together with the CIRO Notice,*
17 *collectively "The Notices". This notice was filed in Case No.*
18 *17-4780 by PREPA. The Notices seek entry of orders approving*
19 *the assumption of two executory agreements concerning the*
20 *purchase and sale of renewable energy, and the underlying*
21 *agreements I'll refer to as the "Contracts". These remarks*
22 *constitute the Court's oral decision resolving the Motion.*
23 *The Motion is cued up by the Notices. The Court reserves the*
24 *right to make non-substantive corrections in any transcription*
25 *of this oral decision.*

1 For the following reasons, the Court overrules the
2 Objection and will enter orders approving the assumption of
3 the Contracts.

4 Section 365(a) of the Bankruptcy Code "advances one
5 of the core purposes of the Bankruptcy Code: To give worthy
6 debtors a fresh start." In re BankVest Capital Corp., 360
7 F.3d 291, 296 (1st Cir. 2004). Although the Bankruptcy Code
8 does not prescribe a standard applicable to a court's review
9 of a motion under section 365(a), courts typically apply a
10 deferential business judgment standard. In re Tempnology,
11 LLC, 879 F.3d 389, 394 (1st Cir. 2018).

12 Such a motion "should be considered a summary
13 proceeding, intended to efficiently review the trustee's or
14 debtor's decision to adhere to or reject a particular contract
15 in the course of the swift administration of the bankruptcy
16 estate. It is not the time or place for prolonged discovery
17 or a lengthy trial with disputed issues." In re Vent Alarm
18 Corp., No. 15-09316-MCF11, 2016 WL 1599599, at *3, (Bankr.
19 D.P.R. Apr. 18, 2016). The scope of a court's inquiry "does
20 not include an evaluation of whether the Debtors made the best
21 or even a good business decision but merely" a determination
22 as to whether "the decision was made in an exercise of the
23 Debtors' business judgment." In re Old Carco LLC, 406 B.R.
24 180, 196 (Bankr. S.D.N.Y. 2009). Here, in its Notice, PREPA's
25 representative has described the Contracts and amendments to

1 be assumed, demonstrating that their terms are favorable to
2 PREPA, in compliance with the Court's procedures order for
3 approving the assumption of power purchase and operating
4 agreements. See Docket Entry No. 1199.

5 The sole objector to the assumption of the Contracts
6 is Windmar Renewable Energy, Inc., which I'll refer to as
7 "Windmar". The basis of the Windmar Objection is that the
8 Contracts are allegedly noncompliant with local Puerto Rico
9 Law, specifically Act 17 of 2019. Windmar asserts that the
10 Contracts' provision for flat-rate bundled pricing of
11 Renewable Energy Certificates and renewable energy delivery
12 violates Act 17 of 2019, which, according to Windmar, requires
13 the prices of the Renewable Energy Certificates and the price
14 of energy to be separately stated in the terms of the PPOA.

15 The Oversight Board, representing PREPA, argues that
16 the objection should be overruled because Windmar has not
17 demonstrated that it is a party-in-interest with standing to
18 assert an Objection to the Contracts. The Bankruptcy Code in
19 § 1109(b) broadly defines the term party-in-interest to
20 "include the debtor, the trustee, a creditors' committee, an
21 equity security holders' committee, a creditor, an equity
22 security holder, or any indenture trustee." While Windmar is
23 an unsecured creditor of the Debtor, Windmar does not allege
24 that it will suffer any harm, including any infringement of a
25 right, in its capacity as a creditor as a result of the

1 assumption of the Contracts. Rather, it complains that PREPA
2 is harming the competitive market in general. Failure to
3 demonstrate that it has any particularized relationship to the
4 contract or that it will suffer a particular harm as a
5 creditor if the PPOAs are assumed, is fatal to Windmar's
6 attempt to establish that it has standing to object. See
7 Pagan v. Calderon, 448 F.3d 16, 27 (1st Cir. 2006), in which
8 the Court said "prudential concerns ordinarily require a
9 plaintiff to show that his claim is premised on his own legal
10 rights, as opposed to those of a third party, that his claim
11 is not merely a generalized grievance, and that it falls
12 within the zone of interests protected by the law invoked."
13 Thus, Windmar's objection is overruled for lack of standing.

14 This Court has previously held, in a decision that
15 was affirmed by the First Circuit, that the business judgment
16 standard governs the resolution of a motion to assume or
17 reject a PPOA. See In re The Fin. Oversight & Mgmt. Bd. for
18 Puerto Rico, 9 F.4th 1, 14 (1st Cir. 2021). Here, the
19 Oversight Board's uncontroverted representations concerning
20 the beneficial terms of the PPOAs and PREPA's renegotiation
21 and approval of the PPOAs are sufficient to meet its burden of
22 demonstrating that the assumption of the Contracts is a
23 reasoned exercise of PREPA's business judgment. PREPA has
24 determined that the projects contemplated by the amended
25 Contracts offer favorable terms and reduced prices in

1 comparison to the terms and pricing originally contemplated by
2 the original Contracts. PREPA has concluded that the
3 Contracts are favorable and should be assumed. The Court
4 finds, based on this uncontroverted record, that PREPA's
5 decision to assume the Contracts was the product of, and falls
6 within the exercise of, reasoned business judgment.

7 Accordingly, the Court will enter an order overruling
8 Windmar's Objection to the assumption of the Contracts and
9 approving PREPA's assumption of the PPOAs.

10 Thank you, Counsel. That concludes the first
11 contested matter. The second contested matter, which is Item
12 III.2 on the Agenda, is the Debtors' Motion in Limine
13 Regarding Evidence Whether the Proposed Plan of Adjustment is
14 Consistent with the Fiscal Plan. That is docket entry no.
15 18116 in case no. 17-3283.

16 The first speaker will be Mr. Bienenstock for the
17 Oversight Board for ten minutes.

18 MR. BIENENSTOCK: Thank you. Good morning, Your
19 Honor.

20 THE COURT: Good morning.

21 MR. BIENENSTOCK: Your Honor, our motion raises a new
22 issue of first impression under a new statute. We raise the
23 issue early, because your ruling may impact the evidence
24 prepared for and proffered at the confirmation hearing.

25 I want to be clear about the relief requested and

1 relief not requested. The relief requested is that the Court
2 rule the only admissible evidence bearing on section 314(b)(7)
3 is the Oversight Board's certification under section 104(j),
4 because the Court lacks subject-matter jurisdiction over a
5 challenge to that certification that the Plan of Adjustment is
6 consistent with the fiscal plan.

7 Additionally, based on practicalities, the Board has
8 suggested that if the Court agrees with the Oversight Board's
9 position, parties should still be allowed to proffer the
10 evidence they would present, so if a reviewing court
11 disagrees, a remand may be unnecessary.

12 THE COURT: Mr. Bienenstock, I --

13 MR. BIENENSTOCK: Relief not -- yes, Your Honor.

14 THE COURT: So in that alternative scenario, it seems
15 to me, at least in your opening papers, that you're asking
16 that the Court accept this evidence and make an alternative
17 advisory ruling just in case an appellate court would disagree
18 with me on the subject-matter jurisdiction point, but how
19 could I make such an advisory ruling and -- so please explain
20 that to me.

21 MR. BIENENSTOCK: Sure, Your Honor. We did not ask
22 for the Court to make an advisory ruling on the proffered
23 evidence. We are simply suggesting that it be part of the
24 record so that, if necessary, the Court would have it and
25 could then subsequently make a ruling without reconvening the

1 hearing.

2 THE COURT: So you want this evidence to be in the
3 record not addressed in case it comes back, and then the Court
4 would make a ruling if it came back?

5 MR. BIENENSTOCK: Right. And, Your Honor, we're
6 really tracking what, through experience, District Courts
7 often do when they sustain an evidentiary objection. They
8 sometimes allow the party proffering the evidence to put it in
9 to maintain the record simply because it creates this
10 efficiency.

11 If the Court did not want to do that, so be it, but
12 we just wanted to provide the -- we're for efficiency, and we
13 thought it would help make the process more efficient. That
14 was all.

15 The relief not requested is that the Court bar
16 evidence on the feasibility of the Plan of Adjustment. If a
17 party-in-interest wants to show the Plan of Adjustment cannot
18 be carried out without further untemplated restructuring,
19 we're not opposing that. The Board is only contending that to
20 the extent a party-in-interest wants to prove the Plan of
21 Adjustment is inconsistent with the fiscal plan, that would
22 undo its certification.

23 I also point out that, as a practical matter, no one
24 is contending the Plan of Adjustment pays creditors too much.
25 Even the government is contending so far that the Plan should

1 pay billions more to pensioners for various reasons. The
2 parties opposing this motion are economically not helping
3 themselves.

4 On the merits, Your Honor, the facts are clear that
5 the Board certified the proposed Plan as being consistent with
6 the fiscal plan pursuant to PROMESA section 104(j)(3).
7 Notably, section 104(j)(3) provides the rule for certifying a
8 plan of adjustment, that it must be consistent with the fiscal
9 plan in the Oversight Board's sole discretion.

10 This is the same as PROMESA section 201(b), labeled
11 "requirements", listing the rules for certifying a fiscal
12 plan. Section 201(c)(3) similarly grants the Oversight Board
13 sole discretion as to whether a fiscal plan satisfies section
14 201(b) requirements. And, as I will mention in a moment, Your
15 Honor has ruled in accordance with what I've just said.

16 Some objectors argue section 106(e) does not apply in
17 Title III cases where section 306 grants subject matter
18 jurisdiction. That argument is wrong for at least five
19 independent reasons.

20 First, section 106(e) has to apply to situations
21 where jurisdiction is granted by other statutes, such as
22 PROMESA section 306 or 28 U.S.C. 1331, because section 106
23 does not grant any jurisdiction. Section 106(a) directs
24 actions under PROMESA and against the Oversight Board to be
25 brought in the United States District Courts. It doesn't

1 grant any jurisdiction.

2 Second, section 106(e) says "there shall be no
3 jurisdiction in any United States District Court to review
4 challenges to the Oversight Board's certification
5 determinations under this Act." The words "any United States
6 District Court" do not carve out District Courts presiding
7 over Title III cases.

8 Third, this Court issued an Opinion dated January 23,
9 2020, where it stated its jurisdictional source was 48 U.S.C.
10 2166, which is PROMESA section 306. Then, this Court applied
11 section 106(e). It ruled that when PROMESA grants the
12 Oversight Board discretion to determine something in its
13 certifications, such as that the budget is compliant with the
14 fiscal plan, an attack on that determination must be dismissed
15 for lack of jurisdiction.

16 The Court said, "however, PROMESA places discretion
17 as to whether a fiscal plan meets the requirements of section
18 201(b), and whether a budget is compliant with the fiscal
19 plan, and, therefore, whether such a budget and such a plan
20 shall be certified in the discretion of the Oversight Board.
21 Thus, to the extent that the petition seeks to challenge the
22 Oversight Board's determination that the budget is compliant
23 with the fiscal plan which meets the requirements of section
24 201(b)(1), it must be dismissed for lack of subject-matter
25 jurisdiction."

1 This in limine motion is on all fours. Just like the
2 Oversight Board's certification that a budget complies with
3 the fiscal plan is not open to attack, its certification that
4 the Plan of Adjustment is consistent with the fiscal plan is
5 equally outside the Court's jurisdiction to review.

6 A fourth reason: 28 U.S.C., section 1331 grants all
7 District Courts subject-matter jurisdiction over federal
8 questions. Section 314(b)(7) is a federal question. If the
9 objectors were correct, section 106(e) can never apply,
10 because of section 1331.

11 Fifth, if section 106(e) does not apply in Title III
12 cases, then it effectively does not apply at all. As a Title
13 III debtor, the Commonwealth can only be sued under PROMESA
14 section 306. Virtually all the litigation brought against the
15 Oversight Board has been in the context of the Commonwealth's
16 Title III case.

17 Moving on, Mr. Hein contends that section 314(b)(7)
18 requires the Court to determine whether the Plan of Adjustment
19 complies with section 201(b)(1)(n), which provides the fiscal
20 plan should respect lawful liens and priorities. We agree
21 that, as part of confirmation, the Court can determine whether
22 allowable liens and priorities --

23 (Sound played.)

24 MR. BIENENSTOCK: -- are treated properly under the
25 Title III Plan of Adjustment. We submit Mr. Hein is wrong,

1 | however, to contend section 314(b)(7) opens up whether the
2 | fiscal plan respects the lawful liens and priorities. That is
3 | not the inquiry under section 314(b)(7). As we've said
4 | before, fiscal plans do not discharge debts, and extinguish
5 | liens, and do not pay them.

6 | Lucky for Mr. Hein, the payment provisions to the
7 | Plan of Adjustment do not need to be consistent with the
8 | fiscal plan, because the fiscal plan pays nothing to General
9 | Obligation claims. Rather, the fiscal plan provides a debt
10 | sustainability analysis showing how much debt the Plan of
11 | Adjustment can agree to pay. Plans of adjustment do pay
12 | claims.

13 | Here, we expect Mr. Hein's class of GO claims will
14 | overwhelmingly accept the Plan of Adjustment, but even if it
15 | rejects the Plan, the test in Title III is the best interest
16 | test and feasibility, not whether the Plan of Adjustment pays
17 | general obligation claims more than the fiscal plan, which
18 | pays them zero.

19 | Similarly in Mr. Hein's contention that the fiscal
20 | plan's population, revenue, and Medicaid projections are wrong
21 | are not remotely implicated by section 314(b)(7). And
22 | Mr. Hein's complaint about lack of audited financial
23 | statements is simply extraneous to this motion.

24 | AAFAF claims in limine motions can only apply to
25 | specific evidence, and it reserves its rights. Mr. Hein's

1 objection actually demonstrates why all parties are better
2 served, however, by knowing sooner, rather than later, whether
3 evidence challenging the fiscal plan can be propounded at the
4 confirmation hearing. Section 314(b)(7) does not remotely
5 suggest that is the case.

6 The DRA parties argue this in limine motion is
7 premature, but it was filed earlier and provided parties --

8 (Sound played.)

9 MR. BIENENSTOCK: -- ample time to respond.

10 Finally, it's important to recognize the purpose
11 served by section 314(b)(7). What it does and what it did in
12 this case, as evidenced by all the fiscal plan litigation that
13 was brought early on, is to tell creditors the Plan of
14 Adjustment cannot issue more debt than the debt sustainability
15 analysis and the fiscal plan allows.

16 Many provisions in Title III protect creditors.
17 314(b)(7) is not one of them. 314(b)(7) protects the
18 Commonwealth from being saddled with more debt than the fiscal
19 plan says is sustainable.

20 That's all I had, Your Honor, unless the Court has
21 questions.

22 THE COURT: Thank you, Mr. Bienenstock. I don't have
23 questions.

24 So I will turn now to AAFAF, Mr. Pocha for AAFAF.

25 MR. POCHA: Good morning, Your Honor. Madhu Pocha of

1 O'Melveny & Myers for AAFAF.

2 And, Your Honor, I'll be extremely brief this
3 morning. We just wanted to clarify that AAFAF filed a
4 reservation of rights to the extent the evidentiary issues in
5 the motion ever ripen as to AAFAF. So we intend it as a pure
6 reservation.

7 And we actually don't have anything additional to add
8 beyond what's in our file, so unless the Court has any
9 questions, we have nothing further and can pass to counsel for
10 the DRA parties.

11 THE COURT: Thank you, Mr. Pocha.

12 So we will pass to counsel for the DRA parties. Who
13 will be speaking for DRA?

14 MR. ZOUAIRABANI TRINIDAD: Yes. Good morning,
15 Your Honor. This is Attorney Nayuan Zouairabani from
16 McConnell Valdes on behalf of AmeriNational Community
17 Services, LLC --

18 THE COURT: Good morning, Mr. Zouairabani.

19 MR. ZOUAIRABANI TRINIDAD: -- and I'm joined by my
20 co-counsel, Peter Amend and Taleah Jennings, from Schulte Roth
21 & Zabel, on behalf of Cantor-Katz Collateral Monitor, LLC.
22 Together we represent the DRA parties.

23 I'll start, Your Honor, and then counsel for the
24 Collateral Monitor will follow.

25 THE COURT: Very well. Thank you.

1 MR. ZOUAIRABANI TRINIDAD: Thank you, Your Honor.

2 Your Honor, the motion in limine faces a couple of
3 procedural hurdles, to put it this way. For the first
4 procedural hurdle that it faces, in -- the Confirmation
5 Procedures Order that was approved by this Court laid out a
6 schedule for filing and responding to motions in limine.
7 These were September 30 for filing, and October 15 to respond.

8 The schedule was already compressed, as it was
9 without the FOMB attempting to short-circuit it by filing a
10 premature motion in limine and forcing parties to respond
11 almost a month before the September 15 deadline. Despite
12 this, the FOMB asserts in their Reply that no parties were
13 prejudiced, because they had opportunity to file objections to
14 their motion in limine on time. However, the FOMB's rationale
15 is of no merit, because, as my co-counsel will explain soon,
16 the issues raised in the motion in limine really go to
17 confirmation of the Plan and should require more than a week
18 to respond.

19 Failure to timely file a response to the motion in
20 limine would have waived the DRA parties' right to make any
21 section 314(b)(7) objections to the Plan. Thus, even if we
22 filed a response on time, that does not mean that there was no
23 prejudice, because, first, it has caused parties to object to
24 the motion in limine before discovery has been completed and
25 all facts are on the table, and, two, it has forced parties to

1 make preliminary objections to the Plan.

2 We note for the record, Your Honor, that the Court
3 rejected FOMB's preliminary objection structure in adopting
4 the Confirmation Procedures Order. However, by filing the
5 motion in limine, the FOMB has attempted to reestablish that
6 structure as far as section 314(b)(7) is concerned.

7 This then leads us to the next procedural hurdle,
8 which is that their motion in limine, there is no actual case
9 or controversy before the Court to adjudicate. As the First
10 Circuit has recognized, motions in limine are meant for the
11 Court to determine whether to include or exclude particular
12 evidence. The FOMB has failed to point to any specific
13 evidence it wished to exclude. They cannot do it, because
14 none has been presented and, in fact, the discovery period has
15 not even concluded. In fact, the FOMB essentially admits in
16 their allocution that this motion is preempted for evidence
17 that has not even been presented yet.

18 A different scenario would have been if evidence has
19 been presented and the FOMB wants to exclude it, but that is
20 not what has happened here, and this is not the proper use of
21 this type of motion practice. The FOMB's real intent with the
22 motion in limine is to prejudge whether the Plan satisfies
23 section 314(b)(7) of PROMESA. Accordingly, the motion in
24 limine is nothing more than a glorified advisory opinion on a
25 matter that must be addressed at confirmation.

1 And with that, Your Honor, I yield the remainder of
2 my time to my co-counsel. Thank you, Your Honor.

3 THE COURT: Thank you, Mr. Zouairabani.

4 So is it Mr. Amend who is next, or Ms. Jennings?

5 MR. ZOUAIRABANI TRINIDAD: Your Honor, I believe my
6 co-counsel is on mute.

7 THE COURT: Whoever wishes to speak should be unmuted
8 now.

9 MR. AMEND: Good morning, Your Honor. Can you hear
10 me?

11 THE COURT: Yes, I can now. Good morning,
12 Mr. Amend.

13 MR. AMEND: Good morning, Your Honor. Peter Amend
14 from Schulte Roth & Zabel, and I'm also joined by Taleah
15 Jennings from Schulte, representing Cantor-Katz Collateral
16 Monitor, LLC.

17 Just to pick it up where Mr. Zouairabani left off,
18 what's even more troubling than the Oversight Board's attempt
19 to rush an already expedited process is that the motion,
20 although styled as a motion in limine, really seeks a pretrial
21 ruling that goes to the confirmability of the Plan itself,
22 that is, the debt adjustment plan's consistency with the
23 fiscal plan under section 314(b)(7).

24 The Board's motion makes this clear. At paragraph 8,
25 the Board requests entry of an order determining there is no

1 subject-matter jurisdiction to consider challenges to the
2 Board's certification that the debt adjustment plan is
3 consistent with the fiscal plan.

4 As Mr. Zouairabani explained, this is an improper use
5 of a motion in limine. Instead, this is an issue the Board
6 should address at confirmation. Although the Court should
7 deny the motion on these procedural grounds, the motion should
8 also be denied on the merits.

9 I begin with two legal authorities that demonstrate
10 that the Court, and not the Oversight Board, decides whether a
11 debt adjustment plan satisfies section 314(b)(7). First, the
12 text of 314(b) says "the Court shall confirm the plan" if all
13 the confirmation requirements are met. The text of the
14 statute is clear. The Court must make an independent inquiry
15 regarding whether all the confirmation requirements have been
16 satisfied. And, second, case law from Chapter Nine, which we
17 cite to in paragraph 19 of our Objection, which provides that
18 even in the Court's more limited role in municipal
19 restructurings, its most significant responsibility is to
20 ensure that the Plan meets all of the confirmation
21 requirements.

22 Now, while Congress gave the Oversight Board a lot of
23 control over the Title III restructuring process, that stops
24 at confirmation. At that point, Congress expressly gave this
25 Court, and not the Oversight Board, authority to determine

1 whether all the confirmation requirements have been satisfied.
2 And this is consistent with Your Honor's *Ambac* decision at 297
3 F. Supp. 3d 269, at 284.

4 And in that case Your Honor wrote that, while
5 Congress gave the Board a central and discretionary role, it
6 is at plan confirmation where the Court will determine whether
7 the debt adjustment plan complies with PROMESA's confirmation
8 requirements. And that's why we'll be before you next month.

9 I'd also like to note that the limitations contained
10 in PROMESA sections 104(j) and 106(e) regarding the Court's
11 ability to review challenges to the Board's certification
12 decisions does not compel the Court to grant the relief
13 requested in the motion. Section 104(j) says, among other
14 things, that the Oversight Board may certify a debt adjustment
15 plan only if it determines in the sole discretion that is
16 consistent with the applicable certified fiscal plan, and
17 106(e) makes the --

18 (Sound played.)

19 MR. AMEND: -- Oversight Board's certification
20 decisions subject to challenge. But, critically, these
21 sections do not mean that, in the context of confirmation, the
22 Court must find that section 314(b)(7) has been satisfied
23 because the Oversight Board simply certified the fiscal plan
24 or the debt adjustment plan. The Oversight Board's proposed
25 scope of sections 104(j) and 106(e) would lead to absurd

1 results.

2 Under the Oversight Board's overbroad theory, these
3 sections would sanction a debt adjustment plan that is
4 premised on a certified fiscal plan that itself violates
5 PROMESA. For example, let's say the certified fiscal plan is
6 contrary to section 201(b)(1)(n), because it does not respect
7 lawful priorities and lawful liens under Commonwealth law, and
8 the debt adjustment plan is based on that same fiscal plan.
9 In the Oversight Board's view of the world, creditors would be
10 forced to accept the consequences of an improper fiscal plan,
11 and the Court would have no say in the matter simply because
12 the Oversight Board certified the fiscal plan.

13 Clearly, this result should not stand at
14 confirmation. And, also, it's contrary to this Court's ruling
15 in *Ambac*, where Your Honor stated at page 284 of that, section
16 106(e) does not deprive the Court of jurisdiction to decide
17 claims that the fiscal plan is invalid or unenforceable as
18 violative of a party's constitutional rights.

19 So with that, I have nothing further unless Your
20 Honor has questions for me.

21 THE COURT: Well, if I were to agree with you on the
22 jurisdictional question, and I'm not here proposing to go into
23 what particular issues the Court could rule on, but just the
24 question of whether 106(e) precludes the Court from doing
25 anything other than checking whether the Board has certified

1 the fiscal plan or not, would you still consider this motion
2 practice premature?

3 (Sound played.)

4 MR. AMEND: Yes.

5 THE COURT: You would?

6 MR. AMEND: Please continue. Sorry.

7 THE COURT: I'm sorry. It seems to me that the
8 thrust of your objections, besides the structural timing ones,
9 is that this -- the Board is seeking, through the argument
10 that there is no jurisdiction, to preclude the introduction
11 and consideration of evidence, and that because discovery is
12 not finished yet and evidence hasn't been presented, the Court
13 shouldn't do that.

14 If, on the other hand, the Court were to say to the
15 Board, no, you're wrong, 106(e) doesn't preclude evidence can
16 be proffered and will be ruled on at the appropriate time,
17 because the Court has jurisdiction to make a determination on
18 the consistency with the fiscal plan, would you say that that
19 issue, that issue of jurisdiction is still improperly
20 addressed in advance of the opening of the confirmation
21 hearing?

22 MR. AMEND: I would say yes. I think that that is an
23 issue that needs to be decided in connection with
24 confirmation, because it goes essentially to what the Court
25 has to do at the hearing, and -- make its findings and

1 conclusions as to whether the confirmation requirements are
2 satisfied.

3 THE COURT: Thank you. There's a little bit of time
4 left for your colleague.

5 Ms. Jennings? You have to unmute.

6 MR. AMEND: Your Honor, nothing further from the DRA
7 parties.

8 THE COURT: Thank you very much.

9 So now I will turn to Mr. Hein --

10 MR. AMEND: Thank you.

11 THE COURT: -- who has five minutes.

12 Good morning, Mr. Hein.

13 MR. HEIN: Your Honor, can you hear me?

14 THE COURT: Yes, I can. Good morning.

15 MR. HEIN: Thank you, Your Honor. Peter Hein, pro
16 se.

17 PROMESA 306(a), the provision in Title III that
18 expressly provides subject-matter jurisdiction, provides
19 broadly for federal subject-matter jurisdiction of all cases
20 under Title III, and of all civil proceedings arising under or
21 arising in or related to cases under Title III. There is no
22 exception to the grant of subject-matter jurisdiction in
23 section 306(a) for determinations under PROMESA 314(b) (7).

24 Turning to PROMESA 314(b) (7), the Oversight Board
25 skips over the prefatory language of 314(b). The prefatory

1 clause in 314(b) is the phrase, quote, the Court -- the Court
2 shall confirm the plan. If -- that prefatory clause applies
3 to all of the requirements for confirmation that follow in
4 each of the seven subdivisions of 314(b). The prefatory
5 clause in 314(b) makes clear that all requirements of PROMESA
6 314(b) are to be determined by the Court.

7 The Oversight Board in its Reply, this is paragraph
8 12, acknowledges tacitly that it is the Court that determines
9 whether the first six requirements in 314(b) are met. The
10 argument that there's no subject-matter jurisdiction for the
11 Court to judge whether the seventh of those requirements has
12 been met is at odds with both common sense and the Title III
13 statutory framework. It just makes no sense to say that
14 Congress intended that the debtor prove that, to the
15 satisfaction of the Court, that (b)(1) through (b)(6) are met,
16 but that the seventh requirement is somehow immune from
17 judicial scrutiny.

18 To construe PROMESA as giving the Oversight Board the
19 ability to obtain confirmation of a plan that releases
20 priority for secured claimants against a debtor without any
21 judicial review of one of its stated requirements creates the
22 due process problem, making the Oversight Board a judge in its
23 own case that the Supreme Court just two months ago decried in
24 the *Chrysafis v. Marks* case that I cited in my opposition.

25 Also, contradicting the Oversight Board's claim on

1 reviewable discretion, the House Report on PROMESA, sections
2 201, 314, which I quoted in my brief, is express. I'm now
3 quoting from the House Report. By incorporating consistency
4 with the fiscal plan into the requirements of confirmation of
5 a plan of adjustment, the committee has ensured lawful
6 priorities and liens as provided for by the Territories'
7 Constitution Clause, and agreements --

8 (Sound played.)

9 MR. HEIN: -- will be respected in any debt
10 restructuring that occurs. And one of the cases the Oversight
11 Board cited arose in a situation where the Oversight Board was
12 seeking confirmation of a plan. Mr. Amend has referred to the
13 *Ambac* case, Your Honor's opinion there, which recognized that
14 it would be at plan confirmation that compliance with the
15 statutory requirements and constitutional challenges would be
16 entertained.

17 If constitutional challenges to a fiscal plan may be
18 raised at the confirmation stage, as this Court ruled in the
19 *Ambac* case, it follows there has to be federal subject-matter
20 jurisdiction to entertain challenges to a fiscal plan at
21 confirmation. And just I would further note that, in the
22 context of confirming the plan and in seeking releases of
23 claims by priority or secured bondholders, whether the fiscal
24 plan and, thus, the Plan of Adjustment, respects lawful
25 priorities and lawful liens cannot be within the sole

1 discretion of the Oversight Board, which is representing the
2 interests of the debtors that are seeking to procure those
3 releases.

4 Section 201(b)(1)(n) is mandatory. The prefatory
5 clause of section 201(b)(1) spells out what a fiscal plan
6 shall provide. The House Report that I've just referenced
7 makes clear that 314(b)(7) is to ensure lawful liens and
8 priorities will be respected in any debt restructuring.

9 At confirmation, the Court has jurisdiction under
10 section 306(a) to decide whether the Oversight Board has
11 complied with all provisions of PROMESA, including
12 201(b)(1)(n). The fact that --

13 (Sound played.)

14 MR. HEIN: -- the Oversight --

15 THE COURT: You may --

16 MR. HEIN: Thank you, Your Honor.

17 THE COURT: -- wrap up.

18 MR. HEIN: Yes. I was just going to add that the
19 fact that this requirement imposed on the Oversight Board
20 under Title I, section 104(j), that the Oversight Board must
21 certify the submission for modification of a plan of
22 adjustment, and may do so only if it determines in its sole
23 discretion that the plan of adjustment is consistent with the
24 applicable fiscal plan, that requirement in Title I on the
25 Oversight Board does not mean that, at confirmation, the Court

1 is not also required to be satisfied that the Oversight Board
2 has complied with PROMESA.

3 Thank you, Your Honor.

4 THE COURT: Thank you, Mr. Hein.

5 So I'll now return to Mr. Bienenstock.

6 MR. BIENENSTOCK: Thank you, Your Honor. I think
7 I'll go in reverse order.

8 To some extent, Mr. Hein's comments and mine, I think
9 we're two ships crossing in the night, but I want to identify
10 where I think we diverge, because it's important. I
11 emphasized that nothing about the current in limine motion
12 suggests that the Court cannot determine at confirmation
13 whether liens and priorities asserted by any party in interest
14 are treated in accordance with Title III and the Constitution.
15 And I'm sure Mr. Hein doesn't mind that concession, and it's a
16 concession we've made throughout the case.

17 Mr. Hein, however, takes that to another level and
18 suggests that determining whether his liens and priorities are
19 treated properly under Title III is not the inquiry, or at
20 least the end of the inquiry. He's saying does the -- the
21 Court should have a trial within confirmation on whether the
22 fiscal plan respects the liens and priorities he asserts, and
23 is essentially asking that the confirmation hearing be a
24 litigation over the entire fiscal plan.

25 His pleading, as I mentioned earlier, goes into

1 population projections, Medicaid, audited financials, the
2 kitchen sink. We think there's nothing in the language of
3 314(b)(7) suggesting that, and he had no response for my
4 comment that since the fiscal plan does not discharge debt or
5 extinguish liens, or pay claims for that matter, it's,
6 frankly, easy to show that the Plan of Adjustment is
7 consistent in that it pays more, because the fiscal plan pays
8 nothing.

9 If we -- Your Honor knows, I think, all parties in
10 interest know how the Oversight Board believes the fiscal plan
11 is not, in effect, a litigable instrument based on section
12 106(e), and for a lot of policy reasons. If we are wrong, I
13 think the parties should definitely know that now, because
14 that changes the confirmation hearing remarkably. But I think
15 Mr. Hein's arguments, along all those lines, simply fail for
16 the reasons I previously mentioned.

17 In terms of the DRA parties' comments that this is
18 all premature, I think Your Honor demonstrated how it's not
19 premature, even though the --

20 (Sound played.)

21 MR. BIENENSTOCK: -- DRA parties declined the
22 suggestion that Your Honor might want to rule in their favor
23 on the jurisdiction question. We hope not. But I think we
24 demonstrated why it's not premature, or a request for an
25 advisory ruling.

1 And as for the actual case or controversy argument,
2 it's not any particular type of evidence that we're talking
3 about. We're talking about all evidence, other than the
4 certification. So it is very specific, by inclusion, as to
5 what is involved here.

6 Unless the Court has questions, that's all I had,
7 Your Honor.

8 THE COURT: Thank you, Mr. Bienenstock. I don't have
9 further questions.

10 I'll again ask everyone's patience as I reflect for a
11 couple of minutes, because I believe I will be ruling on the
12 motion this morning.

13 Thank you for your patience.

14 Pending before the Court is the Debtors' Notice of
15 Motion in Limine in Respect of Evidence Concerning Whether the
16 Proposed Plan of Adjustment is Consistent with the Certified
17 Fiscal Plan that was filed at Docket Entry No. 18116 in Case
18 No. 17-3283, and I'll refer to it as the "Motion", filed by
19 the Financial Oversight and Management Board for Puerto Rico,
20 which I'll refer to as the "Oversight Board", in its role as
21 Title III representative of the Commonwealth of Puerto Rico,
22 the Employees Retirement System of the Government of the
23 Commonwealth of Puerto Rico, and the Puerto Rico Public
24 Buildings Authority, collectively referred to as the
25 "Debtors".

1 The Court has reviewed the pleadings carefully and
2 now makes its oral ruling as to the Motion. The Court
3 reserves the right to make non-substantive corrections in the
4 transcript of this ruling. For the following reasons, the
5 Motion is denied.

6 The Oversight Board has requested entry of an order
7 making two determinations: First, that because the Oversight
8 Board has certified that the proposed plan of adjustment is
9 consistent with the applicable fiscal plan under section
10 104(j) of PROMESA, section 106(e) of PROMESA deprives the
11 Court of jurisdiction to resolve any dispute as to whether the
12 plan of adjustment is, in fact, consistent with the applicable
13 fiscal plan -- I'll refer to this particular question as the
14 "Consistency Issue" -- even though section 314(b) (7) of
15 PROMESA calls for a judicial finding on the Consistency Issue
16 as a precondition to plan confirmation. The Oversight Board's
17 second request is that parties in interest with standing
18 nonetheless be permitted to proffer evidence concerning the
19 Consistency Issue, in anticipation of any prospective need for
20 a complete record after an appeal.

21 Section 312(a) of PROMESA provides that "only the
22 Oversight Board, after the issuance of a certificate pursuant
23 to section 104(j) of this Act, may file a plan of adjustment
24 of the debts of the debtor." 48 U.S.C. § 2172(a). Section
25 104(j) (3) adds, as a condition of submitting or modifying a

1 plan of adjustment, that "the Oversight Board may certify a
2 plan of adjustment only if it determines, in its sole
3 discretion, that it is consistent with the applicable
4 certified fiscal plan. 48 U.S.C. § 2124(j)(3).

5 In general, this Court has subject-matter
6 jurisdiction under section 306(a) of PROMESA, of all cases
7 under Title III of PROMESA, and proceedings arising therein or
8 arising under PROMESA or relating to cases under Title III.
9 48 U.S.C. § 2166. Section 106(e) of PROMESA carves a piece
10 out of that jurisdictional grant, however, providing that
11 "there shall be no jurisdiction in any United States district
12 court to review challenges to the Oversight Board's
13 certification determinations under this Act." 48 U.S.C. §
14 2126(e). Section 314(b)(7), on the other hand, provides that
15 confirmation of a plan of adjustment requires a judicial
16 finding that "the plan is consistent with the applicable
17 fiscal plan certified by the Oversight Board under Title II."
18 48 U.S.C. § 2174(b)(7). The Oversight Board posits that these
19 two provisions contemplate that the Court's finding as to the
20 Consistency Issue should be based solely on the Board's
21 certification, and that the Court cannot consider any
22 challenge to any determinations inherent in such
23 certification. Those opposing the Motion argue that the
24 Court's general jurisdiction of Title III issues empowers it
25 to examine all questions relating to the Consistency Issue and

1 other matters that may implicate certification.

2 The task currently before the Court is to harmonize
3 the foregoing provisions so as to give due effect to all of
4 them, such that no provision eclipses the others, in assessing
5 whether the Court has subject matter jurisdiction to consider
6 anything other than the fact of the Oversight Board's
7 certification or determination on the Consistency Issue, in
8 making the Court's determination under section 314(b)(7) of
9 PROMESA. The Court concludes that section 106(e) does not
10 deprive the Court of jurisdiction to consider evidence and
11 make findings as to the Consistency Issue under section
12 314(b)(7) of PROMESA.

13 The text of section 106(e) broadly precludes
14 jurisdiction to review the "Oversight Board's certification
15 determinations under this Act." That language appears at 48
16 U.S.C. § 2126(e), and encompasses all certification
17 determinations provided for in PROMESA.

18 The First Circuit has confirmed that "Section 106(e)
19 is an exception to PROMESA's general grant of jurisdiction at
20 § 106(a)" that "insulates certification decisions from
21 judicial review." Mendez-Nunez v. Financial Oversight and
22 Management Board for Puerto Rico, 916 F.3d 98, 112 (1st Cir.
23 2019). The First Circuit has recently reiterated the general
24 rule: "PROMESA insulates the Oversight Board's certification
25 determinations from judicial review in the federal courts."

1 UTIER v. Financial Oversight and Management Board, 7 F.4th 31,
2 40 (1st Cir. 2021).

3 The Oversight Board notes that this Court has
4 previously held in these Title III proceedings that section
5 106(e) insulated both the Oversight Board's certifications and
6 the determinations underlying the certifications from judicial
7 review. For example, in Ambac Assurance Corp. v. Commonwealth
8 of Puerto Rico, this Court held that "PROMESA § 106(e) not
9 only grants the Oversight Board exclusive authority to certify
10 fiscal plans, but it also insulates the Oversight Board's
11 certification determinations, which necessarily rest on
12 determinations that certain requirements have been met, from
13 challenge by denying all federal district courts jurisdiction
14 to review such challenges." 297 F. Supp. 3d 269, 283 (D.P.R.
15 2018). In that same decision, this Court stated that "Section
16 106(e) of PROMESA deprives the Court of subject matter
17 jurisdiction of plaintiff's claims in so far as they attack
18 the certification of the fiscal plan or Oversight Board
19 determinations that are inherent in the certification of a
20 fiscal plan." Id. at 289, note 11. Those earlier
21 determinations are not dispositive of the issue raised in this
22 motion practice, however, because none of the earlier
23 proceedings involved an express statutory requirement that the
24 Court rule on an issue on which the Oversight Board has issued
25 a certification.

Notwithstanding the Oversight Board's power and obligation to certify both fiscal plans and the consistency of a proposed plan of adjustment with the applicable fiscal plan, section 314(b) of PROMESA expressly contemplates a judicial determination as to such consistency, as well as other issues, directing that "the Court shall confirm the plan" if a number of conditions are satisfied, including an independent determination that "the plan is consistent with the applicable fiscal plan certified by the Oversight Board under Title II." 48 U.S.C. § 2174(b)(7). Nothing about this provision appears to allow the Court to rely on the mere existence of a certification determination on the Consistency Issue by the Oversight Board. Nor does the statute direct the Court to consider whether the Oversight Board's certification should stand. Section 314(b)(7) must be harmonized with the rest of the statute and cannot be construed in a manner that would deprive it of meaning. See Barnhart v. Sigmon Coal Co., 538 U.S. 438, 454 (2002), in which the Court said, "we refrain from concluding here that differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship."

To reconcile section 314(b)(7) with section 106(e) and its interpretive jurisprudence, the Court construes section 314(b)(7) as requiring an independent determination by

1 the Court of the Consistency Issue, but not as authorizing
2 judicial examination or vacatur of the Oversight Board's
3 certification determination pursuant to section 104(j) on the
4 Consistency Issue. PROMESA assigns functions to both the
5 Oversight Board and the Court. The Oversight Board must make,
6 inter alia, a consistency determination before it can even
7 propose a plan of adjustment. The Court, which has the sole
8 power to confirm a plan of adjustment, must make a consistency
9 determination as to the final iteration of the plan before the
10 Court can confirm it.

11 Accordingly, because the Court has subject matter
12 jurisdiction to consider the Consistency Issue under section
13 314(b) (7), and because the evidence-related relief sought in
14 the Motion is mooted by that determination, the Motion is
15 denied in its entirety. The Court need not address the other
16 arguments made by the objectors except as follows. The
17 jurisdictional element of the Oversight Board's Motion was not
18 a request for an advisory opinion, given the pendency of the
19 confirmation motion and the provisions of PROMESA section
20 314(b) (7), and, for the avoidance of doubt, the Court notes
21 that it has not, in rendering this decision, prejudged any
22 substantive issue.

23 The Court will enter an appropriate order denying the
24 Motion. Thank you.

25 That concludes the Agenda that was announced in

1 advance of this hearing. If anyone has any other matters that
2 need to be addressed today, please use the "hand raise"
3 function now.

4 No hands have been raised, and so this concludes the
5 hearing Agenda for this Omnibus Hearing. The next scheduled
6 hearing is the plan confirmation pretrial conference, which is
7 currently scheduled for November 1, 2021, at 9:30 AM Atlantic
8 Standard Time. As with today's hearing, that hearing will
9 occur over a combination of Zoom and a listen-only telephone
10 line.

11 The Court has already issued a notice of the proposed
12 procedures for that hearing and the confirmation hearing,
13 which can be found at docket entry no. 18276 in case no.
14 17-3283. An appropriate procedural order for those hearings
15 will be issued in due course.

16 As always, I thank the court staff here in Puerto
17 Rico, in Boston, and in New York for their work in preparing
18 for and conducting today's hearing, and particularly in
19 sorting out the logistics for going to the Zoom platform. I
20 also thank them for their outstanding ongoing support of these
21 cases.

22 Stay safe and keep well, everyone. We are adjourned.

23 (At 10:59 AM, proceeding concluded.)

24 * * *

25

1 U.S. DISTRICT COURT)

2 DISTRICT OF PUERTO RICO)

3

4 I certify that this transcript consisting of 56 pages is
5 a true and accurate transcription to the best of my ability of
6 the proceedings in this case before the Honorable United
7 States District Court Judge Laura Taylor Swain, and the
8 Honorable United States Magistrate Judge Judith Gail Dein on
9 October 6, 2021.

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13 S/ Amy Walker

14 Amy Walker, CSR 3799

15 Official Court Reporter

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